DATE: January 27, 1998
CASE NO. 96-INA-441

In the Matter of:

LOVE IN ACTION NO. 2
MIRACLE MAKERS, INC.
Employer

on behalf of

NORMA Y. DEFERIA
Alien

APPEARANCE: Aurelio L. Caparas, Esq.
For the Employer

Before: Holmes, Jarvis, and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On April 20, 1994, the Employer, Love In Action No. 2 Miracle Makers, Inc., filed an application for labor certification to enable the Alien, Norma Y. Deferia, to fill the position of "Group Teacher Category I" which was classified by the Job Service as "teacher (preschool)." The job duties for the position were described as follows:

> Instruct children in activities designed to promote social, physical, and intellectual growth in preparation for primary school or other child development facility; plans individual and group activities to stimulate learning, according to ages of children; supervises the assistant teacher and teacher aide. Children are 3 1/2 to 4 1/2 years old.

(AF 3).

The stated job requirements for the position are: a B.S./B.A. degree in Elementary Education or Early Childhood Education and one year of experience in the job offered (AF 3).

The CO issued a Notice of Findings on January 31, 1996, proposing to deny certification on the grounds, inter alia, that the Employer had rejected qualified U.S. applicants for other than lawful job-related reasons, and failed to show that the job opportunity is clearly open to qualified U.S. workers. See 20 C.F.R. §656.21(b)(6) and §656.20(c)(8). (AF 195-200).

The Employer submitted its rebuttal on or about April 5, 1996 (AF 201-248). The CO found the rebuttal unpersuasive regarding the above-cited deficiencies and issued a Final Determination on April 11, 1996, denying certification (AF 249-251).

On or about May 7, 1996, the Employer appealed the denial of certification (AF 252-316), and subsequently the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review. Employer's appeal brief has also been received and considered.

Discussion

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such good faith requirement is implicit. H.C. LaMarche Ent., Inc., 87-

INA-607 (Oct. 27, 1988); Tilden Car Care Center, 95-INA-88 (Jan. 27, 1997). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

In the Notice of Findings, dated January 31, 1996, the CO correctly stated that the requirements outlined above do not apply only to formal rejections of U.S. applicants, but also to rejections which occur because of the actions taken by an employer. The CO questioned the Employer's good faith recruitment efforts and its rejection of several seemingly qualified U.S. applicants (AF 195-200). In pertinent part, the CO challenged the Employer's rejection of U.S. applicants Veronika Mikhaylovskaya and Victor Weiss, stating:

> For **Veronika Mikhaylovskaya** employer, in recruitment report of March 07 1995, stated she "did not appear, contrary to her promise, for the definitive interview."
>
> Applicant wrote the local office, response received March 20, 1995, advising she was interviewed, by Ms. Heather Battiste, and "I didn't agree with employer's statement that I failed to report for my scheduled interview, because I came for my interview on January 12 at 1:00 PM with all my manuscripts of records and list of references. After this I received a letter by mail which stated that position was full."
>
> Employer found **Victor Weiss** "does not have the required experience since he has never worked as a group teacher. He also does not provide us with the references that he promised."
>
> Mr. **Weiss** wrote the local office that he was interviewed and would have accepted the job if offered. He has more than three years experience as a "Head Teacher" of 2 through 5 year olds and additional experience of children aged 2 through 10 as a Substitute Teacher and Music Director/Volunteer. This resume review establishes qualifications for the job described. Employer's reliance on the Group Teacher title as if in itself it communicates job duties for which applicant has no experience is not supported. Given the general job description of duties for a pre-School Teacher, this applicant is considered qualified to perform duties detailed. Applicant makes no mention of a requirement to supply references. His resume presents a replete work history. As such employer would be at no disadvantage to conduct reference checks in, at the appropriate time and in appropriate fashion.

(AF 196-197).

In its rebuttal, the Employer stated, in pertinent part:

> We have never denied that we talked with applicant **MIKHAYLOVSKAYA**.

> What we reported is that she "did not appear, contrary to her promise, for the definitive interview." We wanted this follow-up or definitive interview because we were in fact seriously considering her for the position. We also wanted to assure ourselves that her experience as a Group Teacher in Russia is similar to what we require because we know that their education setting there is different from what we have here in the U.S. Please see copy of relevant pages from The Encyclopedia Americana, Vol. 27, page 415, attached as Annex D." I have no reason whatsoever to tell otherwise because we were looking to fill up two (2) positions.
>
> As to applicant **Weiss**, his resume indicates, that he could indeed be qualified. So we ask (sic) him for references. Our action, we submit, is not only logical but also sanctioned by case law: "....and considering the applicants background as revealed by her resume, 'the onus was upon employer to further investigate the applicants experience.'" BALCA Deskbook, Supplement, Topic 13. We conducted the same investigation on all qualified applicants, including the two (2) applicants to whom we offered the positions.

(AF 245-246).

Having carefully reviewed the record, we are disturbed by the apparent inconsistencies between the statements of the above-referred applicants and those of the Employer. We also note that, in its rebuttal, the Employer did not directly challenge Ms. Mikhaylovskaya's assertion that she had "received a letter by mail which stated that position was full." (AF 164; *Compare* AF 245). Moreover, the Employer acknowledged that "we were in fact seriously considering her for the position." (AF 245). Accordingly, taken as a whole, we find that Ms. Mikhaylovskaya, an apparently qualified U.S. applicant, underwent an initial interview; and, then, she received a letter from Employer stating that the position was filled. Therefore, it was through Employer's innocent mistake or wilful misconduct that she did not appear for a "definitive" interview. Furthermore, the Employer's alleged basis for rejecting U.S. applicant Weiss is also somewhat inconsistent. In its report of recruitment, the primary reason for rejecting Mr. Weiss was his alleged lack of experience as a group leader. Secondarily, the Employer stated that he did not provide the references that he promised (AF 178). On rebuttal, however, the Employer acknowledged that, based upon his resume, Mr. Weiss "could indeed be qualified," but that he did not produce the requested references (AF 246). While we acknowledge that a potential employer may prefer to receive references from a job applicant's prior employer(s), in many cases such references are unavailable. Moreover, an applicant usually has no control over whether a current or former employer is willing to supply such references. Accordingly, rather than summarily dismiss Mr. Weiss' application, the Employer should have investigated the credentials of this seemingly qualified U.S. applicant through other means. Gorchev & Gorchev Graphic Design, 89-INA-118 (Nov. 29, 190)(en banc).

In view of the foregoing, we find that the Employer failed to document that its actions constituted good faith recruiting procedures, as requested by the CO, in the Notice of Findings. Accordingly, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.